Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

GARY HILL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1 WHETHER THE CLEAR ERROR STANDARD OF REVIEW ALLOWS THE COURT OF APPEALS TO REVERSE FACTUAL FINDINGS OF A TRIAL COURT ON A MOTION TO SUPPRESS EVIDENCE WITHOUT REFERENCE TO THIS COURT'S GUIDING CASE LAW AND WITHOUT MAKING ANY FINDINGS OF PLAIN ERROR?

2 WHETHER THE FOURTH AMENDMENT ALLOWS SEIZURE OF WRITTEN MATERIALS, "CHECK STUBS," UNDER THE PLAIN VIEW DOCTRINE WHERE THE CONTENTS OF THE ITEMS AT ISSUE COULD NOT BE ACCURATELY DETERMINED WITHOUT EXTENSIVE POST-SEIZURE INVESTIGATION AND WHERE THE GOVERNMENT PRODUCED NO EVIDENCE TO SUPPORT THE COURT OF APPEALS' DETERMINATION THAT SEIZING AGENTS HAD PROBABLE CAUSE TO SUSPECT THE STUBS CONTAINED EVIDENCE OF A CRIME BASED UPON THEIR ALLEGED PERUSAL OF THE TOP STUB?

3 WHETHER THIS COURT'S REQUIREMENT THAT SEARCH WARRANTS BE READ IN A COMMON SENSE AND NON-TECHNICAL MANNER WAS VIOLATED BY THE COURT OF APPEALS' HOLDING THAT CHECK STUBS ARE THE SAME THING AS A CASH DISBURSEMENT JOURNAL?

4 WHETHER THE FOURTH AMENDMENT'S REQUIREMENT THAT A WARRANT STATE WITH PARTICULARITY THE ITEMS SUBJECT TO SEIZURE WAS EVISCERATED BY THE COURT OF APPEALS' HOLDING THAT "CHECK STUBS" ARE THE SAME THING AS A "CASH DISBURSEMENT JOURNAL" WHERE THE INSTANT WARRANT LISTED NUMEROUS TYPES OF FINANCIAL RECORDS BUT DID NOT INCLUDE "CHECK STUBS"?

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OPINIONS BELOW

An interlocutory appeal was brought by the Government after the Honorable Donald Walter entered two Orders suppressing in part evidence seized from the law office of Hill & Ramos in El Paso, Texas. In a split opinion, a panel of the Court of Appeals for the Fifth Circuit reversed the district court. *United States v. Hill*, 19 F.3d 984 (5th Cir. 1994). Chief Judge Politz vigorously dissented. *Id.* at 991. Petitioner's timely filed petition for rehearing and Petitioner's petition for rehearing *en banc* were denied on May 18, 1994.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The Court of Appeals had jurisdiction to hear the Government's appeal pursuant to 18 U.S.C. § 3731. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched and the items to be seized."

STATEMENT OF THE CASE

In May 1992, a warrant to search the law offices of Hill & Ramos in El Paso, Texas, was issued to seize fourteen separately enumerated categories of documents for the time frame of 1986 to May 1992. *See* Appendix C for a listing of the categories. Categories "1" to "5" were requested on the basis of information received from three unnamed, cooperating witnesses (all employees or ex-employees of the law firm). Categories "6" to "14" were requested solely on the basis of affiant's education, background and experience. All the categories allegedly related to the structuring of cash deposits into banks in an effort to avoid the banks' filing of currency transaction reports, Form 4789, in violation of 31 U.S.C. § 5324.[1]

The affidavit reflected that affiant had reviewed photocopies of Hill & Ramos' "bank statements, canceled checks, deposit tickets, and deposit items" for the period of November 1985 through May 1991. Significantly, the affidavit did not request and the warrant did not authorize the seizure of *"check stubs, checkbooks, and/or check registers."* The execution of the warrant resulted in the seizure of approximately 50,000 documents, including documents dated prior to 1986, computer discs, client ledgers, personal documents of the Petitioner and 2000 to 3000 *check stubs*.

Some six months later, a second warrant was issued to search Hill & Ramos for documents described in two separate paragraphs for the period of **1981** through

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[1] 31 U.S.C. § 5324 was not even enacted until October 27, 1986, and did not become effective until three months later on January 27, 1987.

November 1992 for alleged violations of 18 U.S.C. § 666 (bribes and thefts).[2] This time the list included the following:

> 1. *Cash Disbursement Journal(s),* and
>
> 2. Bank Statements, Deposit Slips, Canceled Checks, *Check Stubs,* Withdrawal Slips, Debit Memos, and Credit Memos for all checking and/or saving accounts.

These two categories were substantially identical to categories "7" and "8" of the first affidavit except the term *"check stubs"* was now included. *See* Appendix D. Voluminous documents were seized.

Petitioner and two state court judges were subsequently indicted for RICO violations based on alleged violations of the Hobbs Act and the Texas bribery statute. Petitioner was not indicted for any structuring violations. Petitioner moved to suppress items seized in both searches. On August 16, 1993, the Government urged the trial judge to proceed without a hearing. *See* 3 R. 34.

The district court granted in part the motion to suppress the first search and in totality the second search. The Government moved for reconsideration and asserted, *inter alia,* that the *check stubs* were properly seized as falling within 6 of the 14 categories listed in the first affidavit and warrant, to wit:

> 3. *Ledger related documentation* which name clients or contain client lists.

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[2] 18 U.S.C. § 666 was not even enacted until October 12, 1984.

* * *

6. General Journal(s), *General Ledger(s), and Subsidiary Ledger(s).*

7. Cash Receipt Journal(s), Cash Receipt Book(s), and *Cash Disbursement Journal(s).*

8. Bank Statements, Deposit Slips, *Canceled Checks,* Withdrawal Slips, Debit Memos, and Credit Memos for all checking and/or saving accounts.

* * *

12. *Payroll Records,* Payroll Journals, W-2's, and 1099's, and

* * *

14. *Financial records created for, by, or on behalf of the law firm,* such as Loan Applications, records of Loans Payable, Accounts Payable and Notes Payable; records of Accounts Receivable and Notes Receivable; and/or Deeds To Real Estate.

They further argued that the check stubs were seizable under the plain view doctrine. The district court held a hearing, this time at the request of the Government. At the hearing, the Government adduced the testimony of one witness, IRS Special Agent Fernando Gonzalez. 3 R. 1 *et. seq.* The hearing consisted of 32 pages of testimony. The district court reaffirmed its original Order in a second written opinion and disposed of each of the Government's six assertions.

Specifically the district court, fact-finder, rejected the very theory upon which the majority panel opinion below relies. The trial court stated, "[a]gain, the Government

advances a highly technical argument to support the seizure of the check stubs." *Second Memorandum Ruling and Order*. The court quoted Gonzalez' testimony and concluded that "[s]uch complex and layered explanations do not comport with the Fourth Amendment's common sense, nontechnical approach." *Id.* The trial judge went on to note it was not clear that even one with extensive training in accounting procedures would be "reasonably certain" that a "stack of check stubs is the same thing as a cash disbursement journal" and that the argument was unreasonable. *Id.*

The trial court also rejected the Government's plain view argument, noting in pertinent part that:

> Upon viewing three check stubs on the top of a large stack of stubs, it is not clear what conclusion a reasonable officer would have reached. Although it is possible that the visible stubs provided adequate information to establish probable cause, the Government has provided no evidence to support such a conclusion. Rather, this court is left to speculate as to what the agents discovered when they first spotted the stubs.

Id.

The Government filed its notice of appeal. On appeal, the Government argued that the *check stubs* were properly seized as falling within five of the six categories of documents [abandoning *"general ledger(s), and subsidiary ledger(s)*] and were in plain view. After oral argument, a panel opinion was delivered, but it was withdrawn and modified on April 18, 1994. The panel held a reasonable officer could have seized *check stubs* as they were the

functional equivalent of a cash disbursement journal and, in any event, were in plain view.

The panel's holding did not comport with the evidence produced at the suppression hearing. "Check stubs" were not the same thing as "cash disbursement journals" either in the abstract or at the law firm of Hill & Ramos. The check stubs at issue in no way physically resembled a "cash disbursement journal." Rather the check stubs were small pieces of paper bound in bundles by rubber bands. 3 R. 17. More significantly, there were "cash disbursement journals" at the Hill & Ramos office and those were seized. *Id.* The cash disbursement journals seized significantly differed in content from the check stubs (although there was some overlap of information). The journals at Hill & Ramos were compiled by the firm's accountant based on a compilation of the check stubs **and deposit stubs**. *Id.* Finally, Agent Gonzales testified that he would not teach an accounting class that a cash disbursement journal was the same thing as a check stub. *Id.* Such documents generally serve different accounting functions as was the case at Hill & Ramos.

Nor does the evidence adduced at the suppression hearing support the panel's finding that the stubs were seizable under the plain view doctrine. Agent Gonzales admitted that the alleged evidentiary value of the seized check stubs was not determined until after an extensive post-seizure examination of the documents. 3 R. 26. Agent Gonzales did not examine the check stubs as they were seized. *Id.* According to Gonzalez, the contents of the check stubs were not actually discerned until the stubs:

> [W]ere sent to a data input center operated by the Internal Revenue Service in Phoenix, Arizona. At that time they were inputted into a data base. And I was able to do an analytical study of them that way. I was able – Also, we also did a manual, a visual review of each one of the stubs and checks . . . .

Id. Furthermore, as noted above, no evidence was presented at the suppression hearing to support the Government's position that the check stubs were seizable under the plain view doctrine. The testimony is unequivocal. No one examined the top check stub to determine whether the 2,000 to 3,000 check stubs seized contained potential evidence of a crime.

SUMMARY OF ARGUMENT

Certiorari should be granted to correct egregious errors committed by the Court of Appeals which contradict the sound precedent established by this Court. The opinion below contradicts relevant precedent in several regards.

The Court of Appeals stated but then ignored the clear error standard of review that this Court has implemented for a trial judge's finding of fact. *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). No findings of plain error were made by the court below. The facts in the record, however, plainly demonstrate that, if the clear error standard was applied at all, it was applied incorrectly. The Court of Appeals summarily reversed two critical factual findings of the trial court that were not clearly erroneous. This Court's precedent as well as

sound jurisprudential policy compel reversal of the Court of Appeals.

The opinion of the court below also directly contradicts the holding and rationale of this Court's opinion in *Arizona v. Hicks*, 480 U.S. 321 (1987), by finding that the plain view doctrine applied to a situation where the Government had to engage in **extensive post-seizure** investigation of the seized items to determine their contents and potential evidentiary value. *No evidence* was presented at the hearing on Petitioner's motion to suppress to support the panel's opinion that the seizing officers could have determined that each of several thousand check stubs seized constituted evidence of criminal activity based upon viewing the top check stub. Quite to the contrary, the Government's only witness testified that he did not even examine the check stubs as they were seized.

The Court of Appeals' holding contradicts this Court's policy of reading warrants in a common sense and non-technical manner. Only elaborate expert testimony gave the Government the opportunity to claim that "check stubs" were the same thing as a "cash disbursement journal."

Finally, the Court of Appeals reads the particularity requirement out of the Fourth Amendment by allowing the Government to seize unspecified items where specification was possible, and by permitting seizure of certain items under a warrant describing other items.

Certiorari should be granted to correct these deviations from this Court's sound precedent.

REASONS FOR GRANTING THE PETITION

1 THE OPINION BELOW CONTRADICTS THIS COURT'S HOLDING IN *ANDERSON V. CITY OF BESSEMER CITY* BY REVERSING THE FACTUAL FINDINGS OF THE TRIAL COURT IN THE ABSENCE OF CLEAR ERROR.

The Court of Appeals overturned two critical, **factual** findings of the trial court without reference to and in flagrant disregard of this Court's relevant precedent. Factual findings of a trial court on a hearing to suppress evidence are reviewed for **clear error**. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948);[3] *United States v. Seals*, 987 F.2d 1102, 1105-06 (5th Cir.), *cert. denied*, 114 S.Ct. 155 (1993); CHARLES ALAN WRIGHT AND ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2585, 732 (1982).[4] This Court has said that clear error review:

> . . . plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently . . . . **Where there are two permissible views of the evidence, the**

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[3] This Court has never expressly held the "clear error" standard of review applies in the context of an appeal from a pretrial suppression order. The standard is derived primarily from Federal Rule of Civil Procedure 52(a). The history of the standard dates back further, however, as is noted in *United States Gypsum Co.*, 333 U.S. at 395; 68 S.Ct. at 542. This Court also gave general criminal application to the "clear error" standard of review in *Gypsum*. *Id.*

[4] This commentary confirms that "the standard of review set out in Rule 52(a) applies in **all** nonjury cases." WRIGHT AND MILLER at § 2585, 732 (emphasis added).

> **factfinder's choice between them cannot be clearly erroneous.**

City of Bessemer City, 470 U.S. at 473-74 (emphasis added).

The court below overturned two factual findings of the trial judge in violation of this standard. First, the Court of Appeals erroneously overturned the district court's factual determination that check stubs were not the functional equivalent of cash disbursement journals. The panel made the determination that check stubs were the functional equivalent of cash disbursement journals and held that the check stubs were therefore within the scope of the warrant. Specifically, the panel made the following determination:

> We are persuaded that **under the facts of this case**, the check stubs served the same function as a cash disbursement journal and that a reasonable officer knowledgeable of financial records would have reached this conclusion.

Hill, 19 F.3d at 988-89 (emphasis added). This finding directly contradicts the **factual** findings of the district court as noted in the Dissenting Opinion of Chief Judge Politz. *Id.* at 991. In rejecting the Government's complex and highly technical arguments on this point (as required by the common-sense, non-technical approach mandated by this Court, *see e.g., Illinois v. Gates*, 462 U.S. 213 (1983)), the district court noted that even Agent Gonzalez had to admit that check stubs and cash disbursement journals were not the same thing. *Second Memorandum Ruling and Order* at 7. The district court therefore reasonably concluded that "[i]t is unlikely that even highly trained agents were 'reasonably certain' that the check stubs

found in the Hill & Ramos law office were, in fact, cash disbursement journals." *Id.*

The trial court's decision on this matter was not clearly erroneous because there were two permissible views on this issue. Check stubs might or might not be the functional equivalent of a cash disbursement journal on the facts of this particular case. The district court's conclusion that **under the facts of this case**, stacks of check stubs, bound in rubber bands, were not the equivalent of a cash disbursement journal was certainly reasonable given Gonzalez' testimony that they were not the same thing. 3 R. 17. Moreover, there **was** a cash disbursement journal at the offices of Hill & Ramos but it was compiled from two different sources of documents: check stubs **and deposit stubs**. *Id.* It was thus evident that, under the accounting system at Hill & Ramos, the check stubs and the cash disbursement journal were two different accounting tools, a fact emphasized by the trial judge. *Id.* Similarly, the district court's factual finding was also reasonable as check stubs and cash disbursement journals generally contain different information (though some information may overlap). For instance, cash disbursement journals detail only the outflow of money, while check stubs can detail both the inflow and outflow of money as well as miscellaneous information not otherwise contained in a cash disbursement journal.

In short, Agent Gonzalez testified inconsistently and therefore the factual determination was particularly within the discretion of the district court. *Graver Tank & Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). Thus, the district court's emphasis on Agent

Gonzalez' testimony that he would not teach an accounting class that check stubs were the same thing as a cash disbursements journal should not have been questioned on appeal. *Second Memorandum Ruling and Order* at 7. The district court also examined the documents proffered by the Government and it was well within the district court's discretion to conclude that stacks of check stubs, bound in rubber bands, were not in fact the same thing as a cash disbursement journal.

The second factual finding that the Court of Appeals' decision overturned was related to its finding that the check stubs could have been seized under the plain view doctrine. The panel held:

> We have no doubt that the officers had probable cause that the check stubs would be helpful in establishing the money structuring offense. The agents reached this conclusion from the information gleaned from the check stub on top of the bundle and from their general understanding of information ordinarily included in check stubs.

Hill, 19 F.3d at 989. This finding directly contradicts the **factual finding** of the district court that:

> Although it is possible that the visible stubs provided adequate information to establish probable cause, **the Government has provided no evidence to support such a conclusion. Rather this court is left to speculate as to what the agents discovered when they first spotted the stubs.**

Second Memorandum Ruling and Order at 11.

The district court's findings on this matter were not clearly erroneous. They were amply supported by the meager record that the Government produced to carry its burden. *See United States v. Jeffers*, 342 U.S. 48, 51 (1951); *Crowder v. Sinyard*, 884 F.2d 804, 824 n.27 (5th Cir. 1989). All that the Government presented at the suppression hearing was the testimony of Agent Gonzalez who, although present at the search, was not a seizing officer. 3 R. 27. Agent Gonzalez' testimony was largely confined to hypothetical and theoretical comments about why an officer in such a circumstance might have probable cause. 3 R. 29. All of the seizing officers listed check stubs as check stubs and the Government presented no testimony at the suppression hearing that any discussion took place at the scene of the search as to whether the check stubs were or were not within the scope of the warrant. *Id.* It is not surprising that the district court, given that the Government had the burden of proof and presented no direct evidence, concluded that the Government failed to present any factual basis in support of its position.

2 THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWERS TO ENFORCE THE CLEAR ERROR STANDARD OF REVIEW IN THE INTERESTS OF JUDICIAL ECONOMY, BASIC FAIRNESS AND SOUND JURISPRUDENTIAL POLICY.

This Court has articulated the policies underlying the clear error standard of review and they apply with full force to the facts of this case. Judicial economy demands the standard's application. *City of Bessemer City*, 470 U.S. at 574-75. This Court has said that:

> Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.

Id. Here the Government had two opportunities at the trial level to make their case. Once they declined to have a hearing and the judge found against them. *See* 3 R. 34, L. 3-8. Then the trial judge gave them a second chance and they still failed to carry their burden. The Fifth Circuit - in violation of this Court's clear precedent - has given them the opportunity to litigate the same factual issues **for a third time**, this time successfully. Unless this Court makes it clear that this sort of relitigation is impermissible the Court of Appeals for the Fifth Circuit will continue to allow it whenever it disagrees with the result of the trial court.

Additionally, this Court has noted that unfairness results from forcing a prevailing party to again litigate factual matters already resolved in their favor. This Court stated:

> [T]he parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. . . . [T]he trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.' "

Id. Petitioner twice convinced a trial court to find in his favor. The Court of Appeals has allowed the Government to force Petitioner into a third arena, discretionary appeal

to this Court. These matters should have been closed for a long time.

Additionally, the clear error standard of review is sound jurisprudential policy. Legal principles amount to nothing if the facts can continually be altered to fit them. The most insidious thing an appellate court can do is change what happened by making the facts fit existing legal doctrine in order to obtain a desired result. The surface of the law remains unperturbed. The legal principles remain unchanged. However, if the facts can be altered (so long as proper cases are cited), the law does not operate as it should. A legal reality emerges that is different from the legal theory. Here the Court of Appeals rewrote what happened. Without doubt, the evidence should have been suppressed under existing law if the facts were as the trial court found. Not content with this result, the Court of Appeals simply re-wrote the facts to fit the law. The dissenting opinion acknowledged this transgression. Chief Justice Politz noted:

> My colleagues in the majority have made a different factual finding than that made by the trial judge and have reached a different legal conclusion . . . I am diametrically opposed to the expansion of the scope and reach of a search warrant by any form of legal semantics.

Hill, 19 F.3d at 991-992. This is the kind of error that can only be corrected by zealous supervision from this Court.

3 THE OPINION BELOW CONTRADICTS THIS COURT'S HOLDING IN *ARIZONA V. HICKS.*

In the words of dissenting Chief Judge Politz the opinion below "flies in the face of the teachings of *Arizona v. Hicks.*" *Hill*, 19 F.3d at 992. In *Hicks*, the Supreme Court held that seizing officers must have probable cause to believe that the item they allege to be in "plain view" is contraband or evidence of a crime. *Hicks*, 480 U.S. at 326.

Hicks involved entry by the police into an apartment without a warrant but within the exigent circumstances exception to the warrant requirement. *Id.* at 1152. While in the apartment an officer noted that the occupant's stereo looked suspiciously expensive for its surroundings and decided to **move the stereo** in an effort to examine the serial numbers. *Id.* The Supreme Court had no problem concluding that this was a search and agreeing that the officer lacked probable cause to believe that the stereo was evidence of a crime. *Id.* at 1152-53.

The instant case is quite similar. In spite of the lack of direct evidence presented by the Government at the hearing, we know that the officers executing the warrant came across items which we now know to be check stubs. These officers, like the officer's in *Hicks*, did not have probable cause to believe (without examination) that these stubs constituted evidence of a crime. Agent Gonzalez' testimony on this matter is quite clear. He did not know what was on the check stubs - he **presumed** it. 3 R. 29. He did not examine any of the check stubs - much less the top one - prior to their seizure. 3 R. 26; *see also* part one of this Petition (dealing with the factual findings

of the trial court on the issue of plain view). There were thousands of check stubs. Regardless of what may or may not have been on the top one, there could have been no way to know what was on the remainder without examination. The investigating officers in *Hicks* might also have reasonably **presumed** that the stereo had a serial number which would indicate whether it had been stolen. Nevertheless, this Court held that search unconstitutional.

In the instant case, the district court found that there were no facts which could support a finding that the seizing officers had probable cause to think the check stubs had any evidentiary value. His decision should not be disturbed on appeal. Chief Judge Politz's dissenting opinion correctly pointed out that the decision in *Hicks* required an affirmance of the district court's orders. *Hill*, 19 F.3d at 992. The Court of Appeals' opinion made no effort to distinguish *Hicks* or deal with its ramifications. The panel's opinion merely concluded there was probable cause without comparing the facts of this case with *Hicks*.

4 THE COURT BELOW IGNORED THIS COURT'S REQUIREMENT THAT FOURTH AMENDMENT ISSUES BE INTERPRETED IN A COMMON SENSE, NON-TECHNICAL MANNER.

The court below failed to acknowledge, let alone apply, the approach to Fourth Amendment issues mandated by this Court. Simply put, Fourth Amendment issues are to be interpreted in a common sense and non-technical manner. *Illinois v. Gates*, 462 U.S. 213 (1983); *Brown v.*

Texas, 443 U.S. 47 (1979); *United States v. Ventresca*, 380 U.S. 102 (1964).

The district court held that the Government's arguments ran afoul of this standard. The district court was correct. Check stubs were not listed as seizable under the first warrant. Therefore, the Government was forced to engage in sleight of hand in attempting to justify the seizure. The Government's Motion For Reconsideration Of The District Court's 'Memorandum Ruling And Order,' took the position that *check stubs* could have been seized by a reasonable officer under **ANY AND ALL** of *six* of the *fourteen* categories of documents described in the warrant, to wit:

> 3. *Ledger related documentation* which name clients or contain client lists.
>
> * * *
>
> 6. General Journal(s), *General Ledger(s), and Subsidiary Ledger(s).*
>
> 7. Cash Receipt Journal(s), Cash Receipt Book(s), and *Cash Disbursement Journal(s).*
>
> 8. Bank Statements, Deposit Slips, *Canceled Checks*, Withdrawal Slips, Debit Memos, and Credit Memos for all checking and/or saving accounts.
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> 12. *Payroll Records*, Payroll Journals, W-2's, and 1099's, and
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> * * *
>
> 14. *Financial records created for, by, or on behalf of the law firm*, such as Loan Applications, records of Loans Payable, Accounts Payable and Notes

Payable; records of Accounts Receivable and Notes Receivable; and/or Deeds To Real Estate.

See Appendix C. On appeal, the Government abandoned it's reliance upon category "6" and took the position that *check stubs* could have been seized by a reasonable officer under **ANY AND ALL** of *five* of the *fourteen* categories of documents described in the warrant.

It should also be remembered that the Government never developed their argument that the agents were justified and reasonable in seizing what they did. Agent Gonzales did not testify about what he, or any other Government agent, thought when the check stubs were seized. Rather, the Government chose to force the district court and the Court of Appeals to speculate as to what really happened during the search and why the check stubs were seized.

Applying the mandatory, common-sense, non-technical approach yields these conclusions: check stubs are not *"cash disbursement journals"* and the check stubs were not seized under those auspices. Rather, if anything, a reasonable officer would have seized *"check stubs"* as *"financial records created for, by, or on behalf of the law firm,"* an "item" that was listed in the warrant. However, the district court's limiting interpretation of that category – a limiting interpretation designed to save the warrant from being a general warrant that would have resulted in the suppression of everything seized – forced the Government to focus upon "cash disbursement journals" as being the most likely category to be "bought" by the Court of Appeals.

Indeed, the district court's disposition of the six categories of documents that the Government proffered to it as justifying the seizure of the *check stubs* reveals the hyper-technical approach proffered by the Government. The opinion below is contrary to the mandate that Fourth Amendment issues be interpreted in a common sense, non-technical manner.

5 THE OPINION BELOW READS THE COURT'S PARTICULARITY REQUIREMENT OUT OF THE FOURTH AMENDMENT.

The panel's opinion has *de facto* eviscerated the particularity requirement of the Fourth Amendment. In essence, the opinion has read "particularly" out of the Fourth Amendment. Although the court below correctly noted that the purpose behind the particularity requirement of the Fourth Amendment is to prevent a general search, *Marron v. United States*, 275 U.S. 192, 195 (1927), the panel's opinion fails to note that the particularity requirement also prevents the seizure of one thing under a warrant describing another. *Id.* at 196. The Court of Appeals' opinion effectively abrogates both principles. The opinion permits a general search and it allows seizure of one thing under a warrant describing another.

The search warrant in this case was quite elaborate. It enumerated many specific forms of financial records that could be seized under its authority. *See* Appendix C and D. The panel read the warrant so broadly that **any** financial records could theoretically be seized pursuant to it or a similar warrant. As long as a few miscellaneous items are particularly stated, anything related to those items is

seizable because of the breadth of this opinion. The sky is the limit. The fears of Chief Judge Politz are completely justified by the panel's holding. *Hill*, 19 F.3d at 991.

The court below has done great violence to the particularity requirement, as evidenced by Agent Gonzalez' unequivocal admission that he never thought about check stubs when he was preparing the search warrant. 3 R. 12. This admission was consistent with the scope of his investigation: whether cash deposits into banks had been structured to avoid the filing by the banks of Form 4789, in violation of 31 U.S.C. § 5324. 2 R. 111, 116-117. It was only after unidentified evidence of alleged violations of 18 U.S.C. § 666 were discovered on the check stubs that the second affidavit and warrant were drawn up, thereby seeking additional check stubs from **1981** to 1985 relating to further alleged violations of 18 U.S.C. § 666.[5]

As noted above, Agent Gonzalez had information from three employees or ex-employees of the law firm that he utilized in formulating the first five categories contained in the affidavit and warrant. These five categories were extremely specific. Agent Gonzalez then listed eight additional *generic categories* of documents based

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[5] Petitioner finds it remarkable that as to the November 1992 affidavit, the agent could have sought and the magistrate could have authorized the seizure of evidence of a violation of 18 U.S.C. § 666 for the time frame of 1981 to 1985 since 18 U.S.C. § 666 was not even enacted until October 12, 1984! It is equally remarkable that the May affidavit and warrant sought and authorized the seizure of documents from 1986 to and through 1992 for alleged violations of 31 U.S.C. § 5324 when § 5324 was not even enacted until October 27, 1986, and did not become effective until three months later, to wit: January 27, 1987.

upon his experience and training. These were very general but did not include *"check stubs, checkbooks, and/or check registers."* Furthermore, at the hearing, Agent Gonzalez testified to the following:

> Q: Do you believe that these check stubs were identified and included in Attachment 2 to the search warrant?
>
> A: Yes, sir, I do.
>
> THE COURT: Excuse me just one second. Where?
>
> THE WITNESS: Would you like me to – It's difficult sometimes to determine exactly what form the check stub or check register is going to take. So basically, what I've done is to include several terms in there that would relate to any type of journal documentation of the disbursement or receipts of cash in the business. 3 R. 5-6.
>
> * * *
>
> THE COURT: Well, why didn't you say check stubs?
>
> THE WITNESS: I felt satisfied with what I had in there, that it would cover any type of a register or check stubs that were – I didn't have any specific information that there were check stubs or carbon copies or anything like that. . . .
>
> * * *
>
> THE WITNESS: . . . I didn't – again, I was not informed at the time of what type of checkbook they would have.
>
> THE COURT: Yeah, you know they had, for instance, registers with blue covers. Your source

> couldn't have told you what type checkbooks they had?
>
> THE WITNESS: Probably it was just an item that I never inquired about. . . .
>
> THE COURT: Mr. Gonzalez, did you really think about check stubs when you were doing this?
>
> THE WITNESS: Not specifically check stubs.

3 R. 9-12. The court below allowed a generic description – *cash disbursement journals* – to justify the seizure of *check stubs* even though Agent Gonzalez had access to and utilized detailed information concerning the types of documents created and maintained by the law firm and had previously reviewed photocopies of "bank statements, canceled checks, deposit tickets, and deposit items" for the period of November 1985 through May 1991 relating to the Petitioner and the law firm.

The panel's decision thus violates the particularity requirement of the Fourth Amendment. The opinion authorizes a general search and allows seizure of one item through a warrant identifying other items. This Court should grant this petition in order to correct this error.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF FIFTH CIRCUIT

APRIL 18, 1994

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-8685

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

VERSUS

GARY HILL,

Defendant-Appellee.

Appeal from the United States District Court
For the Western District of Texas

(Filed Apr. 18, 1994)

Before POLITZ, Chief Judge, and KING and DAVIS, Circuit Judges. DAVIS, Circuit Judge:

After a grand jury returned an eight-count indictment charging Gary Hill with racketeering, conspiracy to commit racketeering, aiding and abetting extortion under color of official right, and aiding and abetting mail fraud, Hill moved to suppress evidence seized during two searches of his law office. Because we find that the district court erred in granting Hill's motion to suppress, we vacate the district court's order and remand for further proceedings.

I.

Government agents conducted two searches of the offices of Hill & Ramos, an El Paso law firm in which Hill was the managing partner. The first search was conducted in May 1992 pursuant to a search warrant. The magistrate concluded that the affidavit in support of the warrant established probable cause to believe that Hill and his employees were violating 31 U.S.C. § 5324 (Supp. 1993) by structuring banking transactions to evade currency reporting requirements imposed on banks by federal law.

The May warrant authorized seizure of a wide variety of records for the period from January 1986 through May 1992, including "Bank Statements, Deposit Slips, Canceled Checks, Withdrawal Slips, Debit Memos, and Credit Memos" and "Cash Receipt Journal(s), Cash Receipt Book(s), and Cash Disbursement Journal(s)." In executing the warrant, IRS and FBI agents apparently seized some items dated before 1986. The agents also seized, among other items, 2,000 to 3,000 check stubs from the years covered by the warrant. The warrant did not include the term "check stubs."

The law firm check book had perforated check sheets. The checks were located on the right side of the sheet and the corresponding check stub or register was on the left side. Hill used check stubs to record – in addition to deposit and balance information – the date, payee, purpose, and tax consequence for each check. Most of the used check stubs at the law office were held together in bundles with rubber bands and stored with bank statements and canceled checks in drawers and boxes. The

agents executing the May warrant looked at the check stubs on top of the bundle, but did not remove the rubber bands to review the remaining check stubs. Sometime after the May search, the officers reviewed the individual check stubs and sent them to specialists for further analysis.

In November 1992, the government conducted a second search of the Hill & Ramos offices and seized additional financial records. The warrant authorizing the November search was issued upon a showing of probable cause to believe that Hill had violated 18 U.S.C. § 666 (Supp. 1993) (Theft or bribery concerning programs receiving federal funds). The November warrant authorized the officers to seize check stubs as well as other financial records. The affidavit in support of the November warrant relied in part on information taken from the check stubs seized during the May search.

In April 1993, a grand jury returned an eight-count superseding indictment, charging Hill and two other defendants[1] with conspiracy to commit racketeering, 18 U.S.C. § 1962(d), racketeering, 18 U.S.C. § 1962(c), aiding and abetting extortion under color of official right, 18 U.S.C. §§ 1951 and 2, and aiding and abetting mail fraud. 18 U.S.C. §§ 1341 and 2.

Hill moved to suppress all evidence seized during the two searches. As to the items seized during the May search, Hill argued, inter alia, that the search exceeded the scope of the warrant because the warrant did not authorize seizure of items pre-dating 1986, nor did the

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[1] These two defendants are not parties to this appeal.

warrant did not authorize seizure of check stubs. The district court suppressed "all items dated before 1986 and all check stubs." Because probable cause for the second search warrant was predicated in part on information contained in the check stubs, the district court also suppressed all evidence seized during the November search as fruit of the poisonous tree.

The government filed a motion for reconsideration, asserting that the district court erred because the check stubs were within the scope of the warrant and, in the alternative, the plain view doctrine applied to the seizure of the check stubs. After a hearing, the district court reaffirmed its previous order. The government filed a motion to stay the proceedings and filed this interlocutory appeal.

II.

The primary question presented in this interlocutory appeal is whether the district court erred in suppressing certain classes of records seized during the May search – the check stubs and the records pre-dating 1986. Relatedly and depending on the answer to this question, we must also consider whether the district court erred in suppressing all evidence seized during the November search. We review a district court's findings of fact on a motion to suppress for clear error and its ultimate determination of Fourth Amendment reasonableness de novo. **United States v. Seals,** 987 F.2d 1102, 1106 (5th Cir.), **cert. denied,** 114 S. Ct. 155 (1993).

A.

The government argues first that the check stubs were within the scope of the warrant even though the express term was not used in describing the property to be seized. The government contends that the May 1992 search warrant authorizes the seizure of one or more categories of records listed in the warrant that subsume the term "check stubs."

In analyzing whether the May search warrant authorized seizure of the check stubs, we start from the bedrock premise that under the Fourth Amendment, no warrants shall issue except those "particularly describing the . . . things to be seized." This constitutional requirement of particularity seeks to prevent general exploratory rummaging and seeks to ensure that the executing officer is able to distinguish between those items which are to be seized and those which are not. **E.g., Marron v. United States,** 275 U.S. 192 (1927).

To satisfy the particularity requirement, the warrant must " 'be sufficiently definite so that the officer executing it can identify the property sought with reasonable certainty.' " **See, e.g.,** 2 Wayne R. LaFave, **Search and Seizure – A Treatise on the Fourth Amendment** § 4.6(a), at 235 (2d ed. 1987) (citation omitted). In identifying the property to be seized, the agents are "required to interpret the warrant," but are obliged to interpret it narrowly." **United States v. Stiver,** 9 F.3d 298, 302-03 (3d Cir. 1993), **cert. denied,** 114 S. Ct. 1115 (1994).[2] Stated differently, the particularity requirement requires the search

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[2] In **Stiver,** the search warrant authorized seizure of, among other things, "all drug paraphernalia." While executing

warrant to describe the property to be seized with reasonable specificity, but not with elaborate detail. **E.g., United States v. Somers,** 950 F.2d 1279, 1285 (7th Cir. 1991), **cert. denied,** 112 S. Ct. 1959 (1992).

It follows that evidence seized pursuant to a search warrant is not necessarily suppressible merely because the "nomenclature assigned to these items by the defendant might differ from the description contained in the warrant." **United States v. Word,** 806 F.2d 658, 661 (6th Cir. 1986), **cert. denied,** 480 U.S. 922 (1987). For example, in **Word,** the search warrant authorized seizure of specific documents relating to the defendant's medical practice. The defendant complained that the search of his office violated his Fourth Amendment rights because agents seized documents not expressly enumerated in the search warrant. The court rejected the defendant's argument because the government persuaded the court that the items seized were functionally equivalent to other items specifically listed in the warrant.[3] Thus, the question

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the warrant, the officers answered the defendant's telephone and took orders from his customers for illegal drugs. The court held that the officers did not exceed their authority under the warrant by answering the telephone. The court explained that the officers were " 'required to interpret' " the portion of the warrant authorizing seizure of "all drug paraphernalia," and were " 'not obliged to interpret it narrowly.' " **Stiver,** 9 F.3d at 302-03 (citing **United States v. Lucas,** 932 F.2d 1210, 1215-16 (8th Cir.), **cert. denied,** 112 S. Ct. 399 (1991)); **see also Hessel v. O'Hearn,** 977 F.2d 299, 302 (7th Cir. 1992).

[3] Among the items the warrant authorized the agents to seize were "prescription pads, correspondence, patient logs, appointment books, patient payment records, [and] medical records." The defendant complained that the agents exceeded

whether the evidence seized falls within the scope of the warrant ultimately turns on the substance of the item seized "and not the label assigned to it by the defendant." **Id.** at 661.

In this case, the record is uncontradicted that in accounting systems, both check stubs and cash disbursement journals serve virtually identical functions. Both to maintain a running balance in an account and to trace the disposition of cash out of that account. **See** Walter B. Meigs & Robert F. Meigs, **Accounting – The Basis for Business Decisions** 52-53, 237, 247, 305 (7th ed. 1987) (R. 307-320). Like check stubs, a cash disbursement journal provides a chronological record of all cash payments. **Id.** Both also function as a contemporaneous record of transactions. With respect to each transaction, both the cash disbursement journal and a check stub include the date of the transaction, the debit and credit changes in the account, and a brief explanation of the transaction. **Id.** The check stubs seized in this case contained the date of the payment, the name of payee, a brief explanation of the payment, balance and deposit information, and a space for indicating the tax deductibility of the payment.

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the scope of the warrant by seizing, among other items, "day sheets," "spiral notebooks for [patient] sign-in," "patient hospital admission records," and "patient encounter forms." The court declined to suppress the evidence because it accepted the explanation offered by government witnesses that day sheets were used as payment records, that spiral sign-in notebooks were used as appointment books, that hospital admission records were the equivalent of medical records and that encounter sheets contained information regarding billing, patient diagnosis, and treatment history.

In support of its contention that check stubs were the functional equivalent of a cash disbursement journal, the government presented the testimony of Agent Gonzalez, the IRS Special Agent who was the affiant on the May search warrant. Agent Gonzalez, who holds a business degree in accounting, testified that a cash disbursement journal can take the form of any type of register or record that traces the outflow of cash in daily business transactions. Agent also testified that in his experience investigating white collar crimes, he often observes service-oriented businesses where check stubs are the only records that perform this function.[4] According to Agent Gonzalez, the check stubs were Hill's only record of cash transaction until the end of each month. At that time, Hill's accountant transmitted the data from the check stubs into a computer to generate a printed cash disbursement journal.

Hill does not argue that check stubs and cash disbursement journals are functionally dissimilar. Rather, Hill argues that the government admitted that a distinction exists between check stubs and cash disbursement journals when it included both terms in the November warrant. Hill also points out that the agents seized computerized cash disbursement journals during the May search and argues that the check stubs would be suppressible if the computerized cash disbursement journals were seized before the check stubs. We infer nothing from

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[4] Agent Gonzalez's testimony that he would not teach an accounting student that cash disbursement journals and check stubs are one in the same does not contradict his testimony that the two documents serve the same function.

the inclusion of the term "check stubs" in the November warrant – except that the affiant then knew more about the form of Hill's financial records. Nor did the seizure of computerized cash disbursement journals divest the agents of authority to seize functionally equivalent manually produced records. Hill also makes much of Agent Gonzalez's testimony that, when he applied for the warrant, he did not know whether the defendant used check stubs in conducting his financial affairs. But the affiant's lack of knowledge that Hill used check stubs in conducting his business has little, if any, relevance to the question at hand: whether the agents were entitled to seize those documents if the warrant listed functionally equivalent documents. **See, e.g., United States v. Davis,** 589 F.2d 904, 906 (5th Cir.), **cert. denied,** 441 U.S. 950 (1979).

We are persuaded that under the facts of this case, the check stubs served the same function as a cash disbursement journal and that a reasonable officer knowledgeable of financial records would have reached this conclusion. Thus, the check stubs were within the scope of the warrant authorizing seizure of a cash disbursement journal. **See Word,** 806 F.2d at 661; **see also Stiver,** 9 F.3d at 302-03.

B.

Even if the check stubs were not within the scope of the search warrant, the check stubs are shielded from suppression under the plain view exception to the warrant requirement. The plain view exception applies when an officer lawfully in a location by virtue of a warrant or some exception to the warrant requirement seizes an item

having an incriminating character that is "immediately apparent." **Horton v. California,** 496 U.S. 128, 141-42 (1990). It is not necessary "that the officer know that the discovered res *is* contraband or evidence of a crime, but only that there be a practical, nontechnical probability that incriminating evidence is involved." **United States v. Espinoza,** 826 F.2d 317, 319 (5th Cir. 1987) (emphasis in original; quotations and citations omitted). In other words, the seizure must be supported by probable cause to believe that the item viewed is either contraband or will be useful in establishing that a crime has been committed. **Arizona v. Hicks,** 480 U.S. 321 (1987).

The district court reasoned that the officers could not obtain probable cause to believe the check stubs were probative of criminal conduct without removing the rubber bands and inspecting the stubs individually, which the officers did not do. We disagree. As soon as the agents saw the check stubs, they were justified in believing that they were useful as evidence of a money structuring offense. Agent Gonzalez explained that check stubs usually reveal the date of the transaction, reveal how money deposited into an account is spent, and may disclose a purpose for the payment. According to Agent Gonzalez, such evidence may be helpful in proving knowledge of currency reporting requirements and the requisite intent to evade them.

We have no doubt that the officers had probable cause to believe that the check stubs would be helpful in establishing the money structuring offense. The agents reached this conclusion from the information gleaned from the check stub on top of the bundle and from their general understanding of information ordinarily included

in check stubs. The magistrate judge recognized the probable relevance of other similar financial records in tracing the funds that went through Hill's hands. Check stubs are just as likely to identify the nature of Hill's financial transactions as the documents named in the warrant. The district court in effect recognized the relevance of check stubs when it observed that "if the warrant had simply listed 'check stubs,' there would be no dispute."

Hill argues that the district court was nevertheless justified in suppressing the check stubs because Agent Gonzalez should have known the Hill & Ramos law firm utilized check stubs in maintaining its financial records and carelessly omitted them from the warrant application. This argument – that an officer can not seize evidence of criminal conduct he should have expected to find but failed to list in the warrant application – is inconsistent with the Supreme Court's holding in Horton, 496 U.S. 128. In Horton, a warrant authorized officers to search the home of an armed robbery suspect. The warrant authorized a search for only the stolen property. Although the affiant officer had probable cause to believe that weapons used in the armed robbery were also located in the home, the officer did not list the weapons on the search warrant application. While the officer was executing the warrant, he found the weapons in plain view and seized them as evidence of the suspected robbery.

The Court held that the warrantless seizure of the weapons found in plain view during the lawful search for the stolen property was permissible even though the discovery of the weapons was not inadvertent. The Court

rejected the plurality opinion in Coolidge v. New Hampshire, 403 U.S. 443 (1971), that the plain view exception only has application if the discovery of the evidence is inadvertent. The Court's reasoning applies with equal force to this case:

> [E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer. The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant. . . . If the officer has knowledge approaching certainty that the item will be found, we see no reason why he or she would deliberately omit a particular description of the item to be seized from the application for a search warrant.[5]

Horton, 496 U.S. at 138.

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[5] The Court also adopted Justice White's reasoning from his concurring/dissenting opinion in Coolidge:

> Let us suppose officers secure a warrant to search a house for a rifle. While staying well within the range of a rifle search, they discover two photographs of the murder victim, both in plain sight in the bedroom. Assume also that the discovery of the one photograph was inadvertent but finding the other was anticipated. The Court would permit the seizure of only one of the photographs. But in terms of the 'minor' peril to Fourth Amendment values there is surely no difference between these two photographs: the interference with possession is the same in each case and the officers' appraisal of the photograph they expected to see is no less reliable than their judgment about the other. And in both situations the actual

The defendant in Horton made the identical argument that Hill makes here: the inadvertence requirement is necessary to prevent the police from conducting general searches or from converting specific warrants into general warrants. The Court rejected this argument because the relevant interests are protected by the requirement that no warrant issue unless it " 'particularly describ[es] the place to be searched and the persons or things to be seized.' " Id. at 139 (citations omitted). On the facts presented, the Court concluded that "the scope of the search was not enlarged in the slightest by the omission of any reference to the weapons in the warrant." The Court held that the seizure of the weapons was proper under the plain view exception. Id. at 141.

The check stubs in this case are closely analogous to the weapons seized in Horton. Agent Gonzalez had probable cause to search the Hill & Ramos offices for check stubs as well as the other financial records. Apparently, Agent Gonzalez carelessly omitted check stubs from the warrant application. During a lawful search for the items listed in the warrant, the agents encountered the check stubs under the plain view, which they immediately recognized as relevant to their investigation. We conclude that Horton lays to rest all of Hill's arguments that the officers were not entitled to seize the check stubs under the plain view exception to the warrant requirement.

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inconvenience and danger to evidence remain identical if the officers must depart and secure a warrant.

Coolidge, 403 U.S. at 516 (White, J., concurring in part and dissenting in part).

C.

The district court suppressed all documents seized during the May search that pre-dated 1986 because the documents were outside the scope of the warrant. We agree with the district court that documents generated before 1986 are outside the scope of the warrant. On remand Hill should identify which documents he seeks to suppress on this ground so the parties can address these documents specifically and the court can rule on the motion.

D.

The district court suppressed the evidence seized during the November search because probable cause for the warrant was premised in part on information obtained from the check stubs. Because we hold that the agents lawfully seized the check stubs while executing the May warrant, we vacate the order suppressing the evidence seized during the November search as fruit of the poisonous tree.

On remand, the district court should address the remaining arguments raised by Hill in his second motion to suppress. See United States v. Floyd, 992 F.2d 498, 500 (5th Cir. 1993).

For the above reasons, the order of the district court is VACATED and this matter is REMANDED to the district court for further proceedings.[6]

POLITZ, Chief Judge, dissenting:

The majority concludes that the seizure of the check stubs was valid either as falling within the scope of the search warrant or under the plain view doctrine. I cannot agree that either premise is factually and legally appropriate herein and therefore must respectfully dissent.

The majority recognizes, as it must, that the May 1992 search warrant authorized the seizure of multiple records for the period January 1986 through May 1992, including "Bank Statements, Deposit Slips, Canceled Checks, Withdrawal Slips, Debit Memos, Credit Memos, Cash Receipt Journal(s), Cash Receipt Book(s), and Cash

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[6] Hill filed a motion to dismiss this appeal on grounds that the Solicitor General had not authorized its filing as required by 28 C.F.R. § 0.20(b), which provides:

> The following-described matters are assigned to, and shall be conducted, handled, or supervised by, the Solicitor General, in conjunction with each agency or official concerned:
>
> . . . .
>
> (b) Determining whether, and to what extent, appeals will be taken by the Government to all appellate courts. . . .

We agree with the Sixth Circuit's opinion in **Hogg v. United States,** 428 F.2d 274, 277-80 (6th Cir. 1970), which rejected this argument some twenty years ago. We therefore deny Hill's motion to dismiss the appeal.

Disbursement Journal(s)." The warrant did not list "check stubs." This non-inclusion was not inadvertent. Check stubs were not intended to be included. During the hearing on the motion to suppress the district court focused directly on that issue and asked Agent Gonzalez, the responsible agent, why check stubs were not included in the warrant. That exchange between the court and the agent is most informative:

> THE WITNESS: . . . I didn't have any specific information that there were check stubs or carbon copies or anything like that. . . .
>
> . . .
>
> THE COURT: I searched all over when I was looking at this for place that you said "checks" or "checkbooks" so that I could make the leap, but I didn't find that.
>
> THE WITNESS: . . . I didn't – again, I was not informed at the time of what type of checkbook they would have.
>
> THE COURT: Yeah, you know they had, for instance, registers with blue covers. Your source couldn't have told you what type checkbooks they had?
>
> THE WITNESS: Probably it was just an item that I never inquired about. . . .
>
> THE COURT: Mr. Gonzalez, did you really think about check stubs when you were doing this?
>
> THE WITNESS: Not specifically check stubs.

The agent did not seek authority to search for and seize check stubs but between 2000 and 3000 check stubs were nonetheless seized. On the inventory report on the execution of the warrant the officers list, *inter alia*, both "check stubs" and "cash disbursement journals." I take this to reflect that the officers executing the search warrant understood that check stubs and cash disbursement journals were two separate and distinct items. They obviously continued to think so because in a follow-up search warrant authorized and executed in November 1992 the records sought included both "Cash Disbursement Journal(s), and . . . check stubs."

My colleagues in the majority have made a different factual finding than that made by the trial judge and have reached a different legal conclusion. They accept the premise that check stubs are the functional equivalent of a cash disbursement journal and, as such, are within the reach of the search warrant. In their view check stubs are the functional equivalent of a cash disbursement journal because both contain the same information, *i.e.*, the date, purpose, and amount of the transaction. One might suggest that the canceled checks would contain that same information. Are canceled checks to be deemed the functional equivalent of a cash disbursement journal and, as such, subject to seizure under a warrant authorizing the search and seizure of cash disbursement journals? I surely would hope not.

I am diametrically opposed to the expansion of the scope and reach of a search warrant by any form of legal semantics. The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure

of one thing under a warrant describing another"[1] I consider the fourth amendment protections to be much too precious to countenance any type or form of end run. Let the government representative seeking authority to search advise the neutral magistrate of the object(s) sought and the basis for the belief that probable cause of a criminal offense exists. Let the magistrate decide whether to grant this extraordinary power to search and seize and the specific scope of that grant. Then let that search proceed as sought and authorized. That scenario did not occur here. The agent candidly acknowledged that he did not seek authority in the May 1992 warrant to search for and seize check stubs. Notwithstanding, the officers did so. The district court found and concluded that the officers violated the fourth amendment. I agree.

As an alternative ground the majority concludes that the check stubs were subject to seizure under the plain view doctrine. I do not agree. Agent Gonzalez again candidly admitted that he could not tell from what he could see of the bundled check stubs whether they were relevant to the suspected currency offense. That relevance was not determined until the contents of the other stubs were examined later by IRS agents. This admission flies in the face of the teachings of Arizona v. Hicks[2] which requires that a seizure must be supported by probable cause to believe that the item in plain view is either contraband or evidence of a crime. I do not find this

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[1] **Marron v. United States,** 275 U.S. 192, 196 (1927). *See also* **Gurleski v. United States,** 405 F.2d 253, 257 (5th Cir. 1968), *cert. denied,* 395 U.S. 981 (1969).

[2] 480 U.S. 321 (1987).

requirement satisfied. I would affirm the district court's suppression order and therefore respectfully dissent.

APPENDIX B

OPINION OF 5TH CIRCUIT ON REHEARING

MAY 18, 1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8685

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

GARY HILL,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 4/18/94, 5 Cir., ___, ___ F.3d ___)

(May 18, 1994)

Before POLITZ, Chief Judge, KING and DAVIS, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure

and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

APPENDIX C

DOCUMENTS DESCRIBED IN MAY 1992 SEARCH WARRANT

1. Ledger sheets which identify clients and running balances on some client accounts; the ledger sheets are beige in color and are maintained in gray, tin boxes; old ledger sheets are normally stored in the storage room located on the first floor of 1220 Montana Avenue, El Paso, Texas.

2. Ledger books which identify clients and running balances on some client accounts; ledger books have brown binders with beige ledger cards; ledger books are normally stored in the storage room located on the first floor of 1220 Montana Avenue, El Paso, Texas.

3. Ledger related documentation which name clients or contain client lists.

4. Receipts, receipts from receipt books, and receipt books which acknowledge monies received by the Hill and Ramos law firm; receipt books have a blue cover with the name of HILL & RAMOS printed on them; receipts in the receipt book are in triplicate: white copy – which goes to the person making the payment; yellow copy – attached to the monies received – sometimes in the office safe; pink copy – remains in the receipt book; some of the yellow copies are kept in the desk of attorney HILL.

5. White and/or yellow legal pads which document payments received and/or monies owed to Hill and Ramos law firm. These legal pads are maintained by attorney HILL in his individual office.

6. General Journal(s), General Ledger(s), and Subsidiary Ledger(s).

7. Cash Receipt Journal(s), Cash Receipt Book(s), and Cash Disbursement Journal(s).

8. Bank Statements, Deposit Slips, Canceled Checks, Withdrawal Slips, Debit Memos, and Credit Memos for all checking and/or saving accounts.

9. Balance Sheet(s), Income Statement(s), Profit/Loss Statement(s), and Workpapers.

10. Records of Investments owned by Hill and/or the law firm.

11. Purchase orders, Vouchers, Invoices, and Receipts.

12. Payroll records, Payroll Journals, W-2's, and 1099's.

13. Expense Vouchers submitted by employees and/or law firm partners.

14. Financial records created for, by, or on behalf of the law firm, such as Loan Applications, records of Loans Payable, accounts payable and Notes Payable; records of Accounts Receivable and Notes Receivable; and/or Deeds To Real Estate. 1 R. 116-117.

APPENDIX D

DOCUMENTS DESCRIBED IN NOVEMBER 1992 SEARCH WARRANT

1. Cash Disbursement Journal(s), and

2. Bank Statements, Deposit Slips, Canceled Checks, *Check Stubs*, Withdrawal Slips, Debit Memos, and Credit Memos for all checking and/or saving accounts. 2 R. 239 (emphasis added)